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No. 377

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DONALD ANGELINI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Donald Angelini, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 20, 1965, and is not yet reported; it appears in the printed Appendix filed herein and in the record filed simultaneously herewith, and certified by, the Clerk of the United States Court of Appeals.

The Petition for Rehearing was denied on June 21, 1965, and the order denying said Petition is set forth in the Petitioner's Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division was filed on May 20, 1965. On the 21st day of June, 1965, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the requirement to register and pay the occupational tax under Sections 4411 and 4412 of Title 26, U.S.C. violate the Fifth Amendment's prohibition against compulsory self-incrimination?

2. When Section 4412 of Title 26 requires a person in the business of accepting wagers to register, and the Internal Revenue Service issues a form for registration and arbitrarily denominates it a "return" (11-C) will wilful

failure to register constitute a wilful failure to file a return under Section 7203 of Title 26, U.S.C.?

3. Will American justice allow a conviction, and consequent imprisonment, to rest solely on guilt by association and illegal evidence?

STATUTES INVOLVED

Title 26, U.S.C.A. Sec. 4401(c), p. 227:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 525."

Title 26, U.S.C.A. 4411, p. 230:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Title 26, U.S.C.A. 4412, p. 232:

> "(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;
>
> (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
>
> (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Title 26, U.S.C.A. 7203, p. 202:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851."

Title 18, U.S.C.A. 1952, p. 34, pocket part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498."

Title 18, U.S.C.A. Sec. 1084(a), P. 91, pocket part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Ill. Rev. Stat. 1963, Ch. 38, Sec. 28-1, p. 1553:

"28-1. § 28-1. *Gambling.)* (a) A person commits gambling when he:

(1) Plays a game of chance or skill for money or other thing of value; or

(2) Makes a wager upon the result of any game, contest, or any political nomination, appointment or election; or

(3) Operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufacturers or distributes any gambling device; or

(4) Contracts to have or give himself or another the option to buy or sell, or contracts to buy or sell at a future time, any grain or other commodity whatsoever, or any stock or security of any company, where it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, or the option, whenever exercised, on the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof; or

(5) Uses or keeps any book, instrument or apparatus for the purpose of recording or registering bets or wagers or holds any funds which have been bet or wagered; or

(6) Sells pools upon the result of any game or contest of skill or chance, political nomination, appointment or election; or

(7) Sets up or promotes any lottery or sells, offers to sell or transfers any ticket or share for any lottery or

(8) Sets up or promotes any policy game or sells, offers to sell or knowingly possesses or transfers any policy ticket, or other similar device; or

(9) Knowingly advertises any lottery or policy game or drafts, prints or publishes any lottery ticket or share, or any policy ticket or similar device, or any advertisement of any lottery or policy game; or

(10) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.

(b) Participants in any of the following activities shall not be convicted of gambling:

(1) Agreements to compensate for loss caused by the happening of chance including without limitation contracts of indemnity or guaranty and life or health or accident insurance; and

(2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest; and

(3) Pari-mutuel betting as authorized by the law of this State; and

(4) Manufacture of gambling devices, including the acquisition of essential parts therefor and the assembly thereof, for transportation in interstate or foreign commerce to any place outside this State when such transportation is not prohibited by any applicable Federal law.

(c) Penalty.

A person convicted of gambling shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. For each subsequent conviction under Subsection 28-1 (a) (3) through (10) such person shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 3 years, or both fined and imprisoned. As amended by act approved July 8, 1963. L.1963, p.—, H.B.No.374, § 1."

Ill. Rev. Stat., 1963, Ch. 38, Sec. 28-3, p. 1554:

"A 'gambling place' is any real estate, vehicle, boat or any other property whatsoever used for the purposes of gambling. Any person who knowingly permits any premises or property owned or occupied by him or under his control to be used as a gambling

place shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. For each subsequent conviction, such person shall be fined not to exceed $1,000 or imprisoned in the penitentiary from one to 3 years, or both. When any premises is determined by a court having jurisdiction to be a gambling place:

(a) Such premises is a public nuisance and may be proceeded against as such, and

(b) All licenses, permits or certificates issued by the State of Illinois or any subdivision or public agency thereof authorizing the serving of food or liquor on such premises shall be void; and no license, permit or certificate so cancelled shall be reissued for such premises for a period of 60 days thereafter; nor shall any person convicted of keeping a gambling place be reissued such license for one year from his conviction, and

(c) Such premises of any person who knowingly permits thereon a violation of any Section of this Article shall be held liable for, and may be sold to pay any unsatisfied judgment that may be recovered and any unsatisfied fine that may be levied under any Section of this Article."

STATEMENT OF THE CASE

This action was commenced by the return of an indictment charging the Petitioner, Donald Angelini, in two counts, with violating Section 7203, Title 26, United States Code, in that he was engaged in the business of accepting wagers on his own behalf and on behalf of other persons so engaged, without paying the Special Occupational Tax provided under Section 4411 of Title 26, U.S.C. for the taxable year ended June 30, 1964, and that his failure to pay the tax was wilful and knowing; and, with the wil-

ful failure to register as required under Section 4412 of Title 26, U.S.C., and file Internal Revenue Form 11-C with the District Director of Internal Revenue, Chicago, Illinois.

A plea of not guilty was entered on September 11, 1963. (App. 1) A motion to dismiss the indictment was filed on October 28, 1963, and denied on November 26. (App. 2) The cause proceeded to trial on February 17, 1964 before the Court, a jury having been waived. The trial court found the Petitioner guilty as charged and ordered him committed to the custody of the Attorney General for a period of 60 days and fined the sum of $2,500.00 and costs on Count I. On Count II the imposition of sentence was suspended and the defendant was placed on probation for a period of three years, the period of probation to commence at the expiration of the sentence imposed on Count I. (App. 47-48)

On Appeal to the United States Court of Appeals for the Seventh Circuit it was contended that the evidence did not support the judgment; that illegal evidence was used to support the conviction; that opinion evidence was substituted for required proof; that the petitioner was denied his right of confrontation by the admission of documents made by and obtained from a person who was not a witness; that the requirement to register and pay the occupational tax under 26 U.S.C. 4411 and 4412 violated the defendant's rights against self-incrimination and that Count II did not charge a crime proscribed by law.

STATEMENT OF FACTS

Sportsman's Park Race Track, during the period involved here, was presenting evening trotting contests. On August 1, 3, 5, 6, 8, 9, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, and 24, 1963, surveillance of this petitioner's activities at Sportsman's was conducted by agents of the Internal Revenue Service. (App. 11-29) On August 24, 1963, a large group of persons there were arrested by Internal Revenue Agents for accepting wagers without having made the registration and paid the tax as required by 26 U.S.C. 4411 and 4412. Among them was the petitioner.

The evidence presented against him on trial consisted mainly in his being seen talking with persons, giving them money, and taking money from them and on two occasions accepting money from unidentified persons. The theory of the Government's case was that some of the persons with whom he had been seen speaking and exchanging money were persons who had accepted wagers from Internal Revenue Agents during that approximate period, though much testimony was introduced of association with other persons whose occupation or business at Sportsman's Park was not disclosed by the record.

Insofar as the evidence disclosed his association with persons who were accepting wagers, the following occurred:

August 1, he was seen speaking with one Joe Altiere and making notations on paper or cards. (App. 11, 13, 14, 19)

August 3, he was again seen speaking with Joseph Altiere and making notations on a small card. (App. 20)

August 5, 6, and 8, he was seen conversing from time to time with four persons who had accepted wagers during this approximate period from Internal Revenue Agents. (App. 28)

August 29, he was seen conversing with Joseph Altiere and the persons with whom he had been seen conversing on August 5, 6, and 8. (App. 11, 20, 28)

August 12, he was seen conversing with Joseph Altiere and making notations on a piece of paper. (App. 20)

August 13, he was seen conversing with Joseph Altiere (App. 20, 21).

August 15, he was seen talking with Joseph Altiere and one Ronald Mackey. In the late evening he was observed at a restaurant in Chicago with Ronald Mackey and one George Thalos (App. 14, 21, 29).

August 16, he received $1,000 from one William Cessa and handed Cessa a piece of paper. (App. 25)

August 17, he was seen talking with Joseph Altiere and Ronald Mackey. He met with William Cessa and one Humbert Marcontonio. Cessa gave a quantity of currency to the Petitioner and the petitioner wrote something on a piece of paper and handed it back to Cessa. (App. 14, 22, 25)

August 20, he was observed talking to Joseph Altiere, Altiere gave him money, the petitioner made a notation. This happened on three occasions that evening. He was also observed conversing with Marcantonio and Cessa. (App. 18, 25)

August 21, he was seen talking with Joseph Altiere.

August 24, he was seen with Joseph Altiere, at approximately 9:00 p.m. (App. 14, 19, 31).

On the evening of the 24th at approximately 10:30 p.m. this petitioner was arrested and when he removed the contents of his pockets, $8,674.00 and Government's Exhibits 4 through 10 were taken from his person. (App. 15-16)

On the same evening Joseph Altiere was one of those arrested. When he was searched $433.00 was on his person and Government's Exhibits 11 through 17, all of which was seized. (App. 16-17)

At the trial Exhibits 11 through 17, the documents taken from the person of Joseph Altiere, were introduced into evidence through the testimony of Jerry B. Henderson, the agent who had arrested Altiere and who conducted the search of Altiere's person. Stanley R. Wheeler, another agent of Internal Revenue Service, testified as an expert that Government's Exhibits 11 through 16 were records of wagers made with Altiere. He then testified that there was a similarity between those exhibits and Exhibit 4 taken from the person of the petitioner because the sum of the several figures on each of Exhibits 11 through 16 were noted on Exhibit 4. The expert then testified that Exhibit 4 was what was known as a "recap sheet". He also testified that Government's Exhibits 5 and 6 taken from the person of the petitioner, were also recap sheets, though they were not related to any records of wagering put into evidence. (App. 36-40)

The Court of Appeals after detailing the evidence found it sufficient. (App. 4a) It further found that the opinion

evidence was not substituted for required proof. It found the assertion of unconstitutionality invalid. It rejected the attack made on Count II of the indictment as failing to charge a crime proscribed by statute in reliance on *United States* v. *Pasha*, 7 Cir., 332 F. 2d 193 and *United States* v. *Altiere*, 7 Cir., 343 F. 2d 115.

As to all other arguments advanced, the Seventh Circuit merely concluded:

> "We have considered various other arguments advanced by the defendant with respect to the legality and sufficiency of the evidence but we find them without merit." (App. 4a).

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. The enactment of Federal legislation making criminal certain activities of persons in the business of accepting wagers, and this Court's decisions in defining the privilege against self-incrimination to extend to incrimination under State as well as Federal law renders the constitutionality of the taxing and registration provisions of Sections 4411 and 4412 gravely doubtful and constitutes an important question of Federal law which has not been, but should be, settled by this Court.

2. Section 4412 requires a person engaged in the business of accepting wagers to register. Regulations enacted by the Treasury Department under authority of that section require such persons to register *and file a return.* Prosecutions for wilful failure to file that return constitute executive legislation and this Court should, in its supervisory power, prohibit such prosecutions.

3. This Court should exercise its supervisory power to void a conviction which rests upon guilt by association, and documents whose only qualification is that they were taken from the person of a stranger to the lawsuit, not a witness, all in conflict with applicable decisions of this Court and of the Courts of the several circuits.

I.

Section 4411 imposes a $50 special tax to be paid by persons "engaged in the business of accepting wagers" or who are engaged in receiving wagers for or on behalf of

a person "engaged in the business of accepting wagers." Section 4412 of Title 26 United States Code requires that such persons register their name and address; if they are "engaged in the business of accepting wagers," each place of business where they are so engaged and the name and place of residence of each person employed by them; and if they are engaged in receiving wagers on behalf of a person "engaged in the business of accepting wagers" the name and address of the employer.

Section 1084 of Title 18 United States Code proscribes the use of wire facilities for transmission in interstate commerce of bets, wagers, or information assisting in the placing of bets or wagers by any person "engaged in the business of betting or wagering." Section 1952 of Title 18 United States Code proscribes interstate travel and the use of the mails with intent to distribute the proceeds of any business enterprise involving gambling, or otherwise promote, manage, establish, carry-on, or facilitate the promotion, management, establishment, or carrying-on of any business enterprise involving gambling.

It is immediately apparent that a basic element of proof under Section 1084 is the showing that a person accused thereunder was "engaged in the business of betting or wagering." Sections 4411 and 4412 compel a disclosure that a person is "engaged in the business of accepting wagers." It is a basic element of proof under Section 1952 that the person accused be in a "business enterprise involving gambling." Thus, to comply with the provisions of Sections 4411 and 4412 is to compel confession of the basic elements of the crimes recited above.

In this connection, thorough consideration of the possibility of compulsory self-incrimination of persons engaged in the business of wagering through the provisions

of Sections 4411 and 4412 of Title 26 U.S.C., must be given to the fact that Section 1952 defines any business enterprise involving gambling as an "unlawful activity." Thus, such registration requires an admission of an activity defined as unlawful by the statutes of the United States.

It has been held that the privilege against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman* v. *United States,* 341 U.S. 479. This being so, it cannot be doubted that the privilege extends to information which, by operation of statute, *prima facie* establishes proof of necessary elements in the commission of crime.

Further, compliance with Sections 4411 and 4412 of Title 26, U.S.C., violates against the Fifth Amendment's prohibition against compulsory self-incrimination under state law. In *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, the law regarding the privilege of self-incrimination under the Fifth Amendment to be:

> "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. at p. 77-78.

Section 4412 of Title 26, U.S.C. makes requirements that information be filed including the name and place of residence of the person registering as well as the place of business where he is in the business of accepting wagers. This information is clearly violative under state law.

Illinois Law (pp. 5-7, *supra*) subjects to criminal penalty anyone who keeps books and records or apparatus for the business of recording bets or wagers. Section 4401 re-

quires the payment of tax on wagers, which in turn requires the keeping of records of wages made. A registration that you are liable to the tax under 4401 is substantially complete proof of a violation of State law.

The registration provisions of Section 4412 require that the person required to register list the places where he does business. Illinois Law (pp. 7-8, *supra*) makes criminal the use of premises or property as a gambling place. Listing such places as is required by Section 4412 is an admission of violation of State law.

On the foregoing basis we submit that the requirement to register and pay the occupational tax under these sections is violative of the prohibition against compulsory self-incrimination.

II.

Count II of this indictment charges a violation of Section 7203 of Title 26, U.S.C., in that he was required by law and by lawful regulations made under authority thereof to register with and to file with the District Director of Internal Revenue "a return, Internal Revenue Form 11-C." Section 7203 of Title 26, United States Code does not proscribe a failure to register. The source of the crime alleged here is, apparently, found in Section 4412 of Title 26, U.S.C. That section provides that each person required to pay the special occupational tax under Sections 4401 and 4411 *must register*. The regulation of the Treasury Department was issued purportedly to implement the statute. The regulation, known as 26 C.F.R. 44.4412-1(a), provides that every person required to pay the special tax imposed by Section 4411 *shall register and file a return*. It is apparent that the requirement in the registration that return be filed is not found in Section 4412 of the Code. The regulation plainly goes beyond the requirements of the Statute upon which it relies. It is clear that a regulation may not

alter a statute. *Manhattan General Equipment Co.* v. *C. I. R.*, 297 U.S. 129, 135. This regulation obviously does alter the statute.

Nor is this the first time that Treasury regulation has attempted to expand upon the statutory requirements of Sections 4411 and 4412. In denouncing such expansion the United States Supreme Court said in *Calamaro* v. *United States*, 354 U.S. 351 at 358-9:

> "We find neither argument persuasive. In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute."

Treasury Regulations have been consistent in their efforts to enlarge statutory requirements. They have just as consistently been thwarted by Supreme Court in limiting their legislative tendencies.

> "But we are told that Treasury regulations long in force require an allocation of the original cost between the preferred stock purchased and the common stock received as dividend. And it is said that while no provision of the statute authorizes a specific regulation respecting this matter, the general power conferred by the law to make appropriate regulations comprehends the subject. Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous and its directions specific, there is no power to amend it by regulation." *Koshland* v. *Helvering*, 295 U.S. 441, 446-7.

III.

Conviction was had in this case on evidence only of association with known bookmakers, and a similarity between documents taken from the person of Joseph Altiere on his arrest and one of the documents on the petitioner. Such a conviction should be voided in the exercise of this Court's supervisory power over the lower Courts of the United States. Sustaining of guilt by association is in direct conflict with this Court's decision in *United States* v. *DiRe,* 332 U.S. 581, 593; and of various Circuit Court decisions including *United States* v. *Malloney,* 7 Cir., 200 F. 2d 344; *Dennart* v. *United States,* 6 Cir., 147 F. 2d 286; *Rent* v. *United States,* 5 Cir., 209 F. 2d 893, 897.

There is in this record no evidence of the petitioner ever accepting wagers as charged in the indictment. The basis for the determination of guilt by the trial court and the Court of Appeals was actually the association of the petitioner with Joe Altiere. That is made clear from the decision:

> "A search, subsequent to his arrest at the track, revealed he had $8,674.00 on his person and documents identified by an expert witness as 'recap sheets' showing net gain or loss for wagering operations at the end of any particular race. On one of these sheets a column of figures designated by the letter 'R' corresponded exactly with a record of wagers seized from Joe 'Red' Altiere at the time of the latter's arrest. Altiere was one of the individuals with whom the government agents had placed wagers and who had been observed handing money to the defendant." (App. 3a)

The relationship between Joseph Altiere and this Petitioner was grounded on the similarity between one of the documents taken from this petitioner and documents taken from the person of Joseph Altiere. Joseph Altiere did not appear as a witness. The only qualification of the documents was that they had been taken from his person, and on that qualification and their similarity to Exhibit 4 taken from the person of the petitioner, they were admitted into evidence. Such admission is in conflict with decisions of other circuits, where, in *civil cases,* the want of foundation rendered the documents inadmissible. In one such case the Court commented upon the effect of such introduction in a criminal case:

> "In a criminal case it is doubtful whether such a deprivation of the right of the accused to be confronted with the witnesses against him would be constitutional." *New York Life Insurance Co.* v. *Taylor,* C.A.D.C., 147 F. 2d 297, 206.

Decisions of other circuits in accord with the District of Columbia decision are *Baltimore American Insurance Company* v. *Pecos Merchantile Co.,* 122 F. 2d 143, wherein at page 146 various other authorities to the same effect are set forth. Another District of Columbia circuit case to the same effect is *Communist Party of U.S.* v. *Subversive Act. Con. Ed.,* 254 F. 2d 314, where the Court said at page 325:

> "Such reports would not be admissible, unless the author was put on the stand and subjected to cross examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified, third person purporting to show what a witness had said or done. The hearsay rule applies to writings." *Communist Party of U.S.* v. *Subversive Act. Con. Ed.,* C.A.D.C., 254 F. 2d 314, 325.

CONCLUSION

Wherefore, this petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

ANNA R. LAVIN,
Attorney for Petitioner

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14765
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD ANGELINI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 20, 1965.

Before HASTINGS, *Chief Judge,* and KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Donald Angelini, the defendant-appellant, prosecutes this appeal from a judgment of conviction and sentence, entered following a trial before the court without a jury, on a two count indictment charging violations of 26 U.S.C.A. §7203. Count I charged a wilful and knowing failure to pay the special occupational tax on the business of accepting wagers (26 U.S.C.A. §4411). Count II charged a wilful and knowing failure to register and file a return (26 U.S.C.A. §4412). The

defendant was sentenced to imprisonment for a period of sixty days and to pay a fine in the sum of $2,500.00.[1]

The contested issues presented by defendant's appeal concern the legality and sufficiency of the evidence, the constitutional validity of Sections 4411 and 4412, and whether Count II of the indictment charges an offense proscribed by law.

The attack made on Count II of the indictment is the same as that urged and rejected in *United States* v. *Pasha,* 7 Cir., 332 F. 2d 193, 195, cert. den. 379 U.S. 839. We regard *Pasha* as dispositive of the issue concerning the validity of Count II. *United States* v. *Altiere,* 7 Cir., 343 F. 2d 115.

The defendant's contention that Sections 4411 and 4412 are unconstitutional is grounded on the assertion that the requirements of each of these sections constitute compulsory self-incrimination and thus violate the Fifth Amendment. This Court has repeatedly held to the contrary. *United States* v. *Zizzo,* 7 Cir., 338 F. 2d 577, 580; *United States* v. *Cefalu,* 7 Cir., 338 F. 2d 582, 585; *United States* v. *Altiere,* 7 Cir., 343 F. 2d 115.

In resolving the issue of the sufficiency of the evidence to sustain defendant's conviction we must view the evidence, and the reasonable inferences which may be drawn therefrom, in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. 60, 80. From our examination of the record we are satisfied that, contrary to defendant's contention, the evidence warranted the court in concluding that the defendant was, during the period alleged, engaged in the business of accepting wagers. His knowledge of the existence of the provisions of Sections

[1] Imposition of sentence was suspended as to Count II and the defendant placed on probation for a period of three years commencing at the expiration of the 60 day sentence.

4411 and 4412 is established by the fact that he made application for and received the special occupational tax stamp required under those sections for the fiscal years ending June 30, 1957 and 1958. We do not deem it necessary to recite the evidence in detail or to point to all of the corroborative factors therein. Suffice it to observe that the record discloses that on a number of occasions during the month of August 1963 the defendant was observed at Sportsman's Park, a Cicero, Illinois, race track, receiving money from persons with whom the government agents had placed wagers on the horse races being run. On these occasions he was observed making notations. A search, subsequent to his arrest at the track, revealed he had $8,674.00 on his person and documents identified by an expert witness as "recap sheets" showing net gain or loss for wagering operations at the end of any particular race. On one of these sheets a column of figures designated by the letter "R" corresponded exactly with a record of wagers seized from Joe "Red" Altiere at the time of the latter's arrest. Altiere was one of the individuals with whom the government agents had placed wagers and who had been observed handing money to the defendant. The activities of the defendant disclosed by the record, coupled with his possession of records of the nature of the "recap sheets" here involved, are a legitimate basis for the inference that he was engaged in the business of accepting wagers. *Rutherford* v. *United States,* 9 Cir., 264 F. 2d 180, 185.

Defendant claims reversible error occurred in the admission into evidence of the documents, identified by the expert witness as records of wagers, seized from the person of Altiere at the time of the latter's arrest. This contention, predicated on asserted illegality of Altiere's arrest, is without merit. Such objection was not raised in

the trial court. It therefore affords no basis for a claim of error on appeal. Moreover, the arrest of Altiere was proper and legal. *United States* v. *Altiere,* 7 Cir., 343 F. 2d 115.

Defendant's contention that opinion testimony was substituted for required proof is unpersuasive. In this connection he relies on *United States* v. *Sette,* 2 Cir., 334 F. 2d 267. But the rationale of that decision is inapposite here. Unlike the situation presented in *Sette,* the expert testimony in the instant case served only to identify the nature of the documents seized from the defendant and from Altiere at the time of their respective arrests and to correlate these records—there was no expression of opinion as to the ultimate fact in issue—whether defendant was accepting wagers with a proprietary interest in such operation (*United States* v. *Calamaro,* 354 U.S. 351, 356). That conclusion was drawn by the court but it was not supplied in the form of a conclusional opinion by an expert witness.

We have considered various other arguments advanced by the defendant with respect to the legality and sufficiency of the evidence but we find them without merit.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60610
Thursday, May 20, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DONALD ANGELINI, *Defendant-Appellant.* No. 14765	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60610
Monday, June 21, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 14765 vs. DONALD ANGELINI, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing filed by defendant-appellant herein be, and the same is hereby Denied.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 377

DONALD ANGELINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1965. A petition for rehearing was denied on June 21, 1965. The petition for a writ of certiorari was filed on July 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the occupation tax and registration provisions of the federal wagering tax laws violate the privilege against self-incrimination.

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2. Whether willful failure to file a wagering tax return is an offense.

3. Whether wagering records were properly admitted into evidence when the person from whom they had been obtained was not called as a witness.

STATEMENT

A two-count indictment returned in the Northern District of Illinois charged petitioner with engaging in the wagering business between August 14, 1963, and August 24, 1963, in violation of section 7203 of the Internal Revenue Code, 26 U.S.C. 7203. Count 1 charged that petitioner willfully failed to pay the special $50 tax on engaging in the business of wagering. Count 2 charged that he willfully failed to register and file a wagering tax return (A. 7–8). Petitioner was found guilty. He was sentenced to imprisonment for 60 days and fined $2500 on count 1, and was placed on probation for a period of three years on count 2. (A. 47–48.)

At various times in August 1963, petitioner was watched by federal agents at a Cicero, Illinois, race track. He was observed exchanging money with Joe "Red" Altiere and other named persons (A. 17–18, 21, 23–25, 28) who had accepted wagers on the horse races (A. 25–27, 29–31), and making notations when he talked with these individuals (A. 17–18, 25). On one occasion a man handed petitioner $20 and said "$20 on Quarter Chief," and on another occasion a man gave him $15 and said "Chapter Rhythm." These were horses which ran in the next races (A. 12–13). Petitioner was never seen making a bet at

the pari-mutuel windows (A. 14, 20). On August 24, petitioner and Joe Altiere were arrested at the track. A search of petitioner's person at that time revealed that he had on his person various papers and $8,674.00 in currency (A. 15–16). An expert described the papers as "recap sheets relating to horseracing," listing the winnings on horses at the end of particular races (A. 34–35). The recap sheets showed exactly the same profits and losses for the first five races at the race track on August 24 as records seized from Altiere at the same time (A. 36–38). Petitioner had not paid the occupation tax or registered or filed the required return for the tax year ending June 30, 1964 (A. 10).

ARGUMENT

1. In *Lewis* v. *United States*, 348 U.S. 419, this Court rejected the argument that the occupational tax and registration provisions of the federal wagering tax laws violated the privilege against self-incrimination because petitioner was subject to a federal (District of Columbia) statute making wagering a crime. It stated (pp. 422–423):

> If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefore, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

It makes no difference that here petitioner is subject not to a District of Columbia, but to other statutes making wagering an offense. See, *e.g.*, *United States* v. *Zizzo*, 338 F. 2d 577, 580 (C.A. 7).

2. Under Count 2, petitioner was charged with willfully failing to register and file a wagering tax return. Section 7203 of the Internal Revenue Code provides that any person who is required to pay a tax or "by regulations made under authority thereof to make a return" and willfully fails to do so is guilty of a misdemeanor, and section 6011(a) provides that the Secretary of the Treasury may by regulation require that any person who is liable for a tax shall make a return. Therefore, contrary to petitioner's contention, the Secretary was authorized to promulgate a regulation requiring a wagering tax return. Such regulation is also consistent with section 4412 of the Code, which provides that every person required to pay the wagering occupation tax must register.

3. The records seized from Joe Altiere were properly admitted into evidence without his testimony. These records corresponded exactly with petitioner's recap sheets; they showed the same winnings and losses for the first five races at the race track. This similarity, plus the fact that petitioner had been observed dealing with Altiere, provided sufficient foundation for their introduction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.
FRED M. VINSON, JR.,
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SIDNEY M. GLAZER,
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AUGUST 1965.

END